

This Opinion Is Not a
Precedent of the TTAB

Mailed: January 13, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Superior Balance S.L.

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Application Serial No. 88632909

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Avraham S.Z. Cohn of Cohn Legal, PLLC for Superior Balance S.L.

Dezmona J. Mizelle-Howard, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

—
Before Bergsman, Wolfson and Pologeorgis, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Superior Balance, S.L. (Applicant) seeks registration on the Principal Register of
the mark Y-STRAP, in standard character form, for the goods listed below:

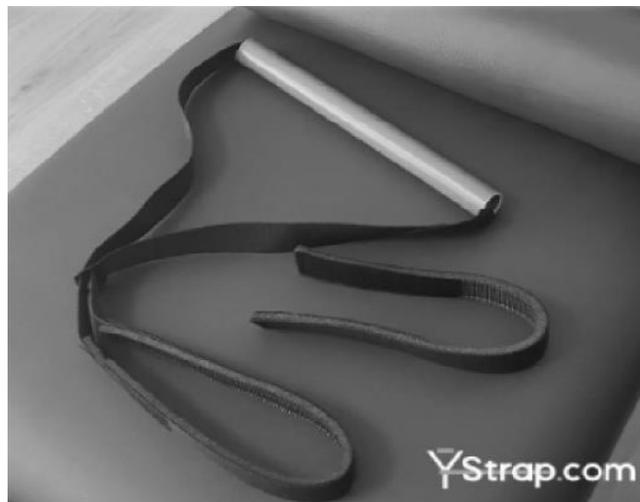
Physical exercise apparatus, for medical purposes; Posture
correction device, namely, an adjustable harness to correct
one's posture for medical purposes; Stretching machines
for therapeutic purposes; Traction apparatus for medical
use, in International Class 10.¹

¹ Serial No. 88632909 filed September 26, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use of its mark anywhere as of August 12, 2019, and first use of its mark in commerce as of August 18, 2019.

The Examining Attorney refused to register Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Y-STRAP when used on the identified goods is merely descriptive because it “is a combination of descriptive word, ‘Y’ that describes the shape and ‘STRAP’ that describes the function.”²

Specifically, the wording **Y-STRAP** describes the shape and function of the goods in that the goods presented are essentially, a strap in the shape of a “y”. A term that describes the shape or form of a product is merely descriptive. *In re Metcal Inc.*, 1 USPQ2d 1334 (TTAB 1986) (holding SOLDER STRAP merely descriptive of self-regulating heaters in the form of flexible bands or straps); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982) (holding TOOBS merely descriptive of bathroom and kitchen fixtures in the shape of tubes). Finally, the “Y” in the mark also refers to “y-axis traction strap” that is a common term in the relevant field.³

We reproduce below an excerpt from Applicant’s specimen of use displaying Applicant’s medical apparatus.



² Examining Attorney’s Brief (6 TTABVUE 5).

³ *Id.* (6 TTABVUE 6).

I. Preliminary Issue

Both Applicant and the Examining Attorney attached exhibits to their briefs.

Trademark Rule 2.142(d) provides,

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

Because neither Applicant nor the Examining Attorney submitted a request to the Board to suspend the appeal and remand the application for further examination, we will not consider any of the new evidence attached to the briefs.

To the extent that the Examining Attorney previously submitted the evidence attached to her brief during the prosecution of the application, resubmitting evidence is unnecessary and it is not helpful. *See Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1955 n.4 (TTAB 2008).

II. Whether Y-STRAP is merely descriptive.

A. Applicable Law

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act precludes registration of a mark on the Principal Register that, when used in connection with an applicant's goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "A mark is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought." *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965,

128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)).

We “must consider the mark as a whole and do so **in the context of the goods or services at issue.**” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (emphasis added); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017). “Whether consumers could guess what the product is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). Rather, “the question is whether someone who knows what the goods and services are will understand the mark to convey information about them.” *DuoProSS*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

This applies to compound marks as well.

In considering a mark as a whole, the Board may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components. ... [I]f ... two portions individually are merely descriptive of an aspect of appellant’s goods [or services], the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.

In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004).

The issue before us is whether the mark Y-STRAP as a whole is merely descriptive when used in connection with the identified goods. Alternatively, as stated above, the issue is to determine how a consumer of the medical apparatus will perceive the term Y-STRAP.

B. Relevant Evidence

The Examining Attorney submitted the evidence listed below to prove Y-STRAP used in connection with medical apparatus is merely descriptive:⁴

- Tungate Chiropractic website (tungatechiropractic.com)

WHAT IS THE Y-STRAP ADJUSTMENT?

WHY THIS CHIROPRACTIC TOOL IS CALLED Y-STRAP?

The “Y-Strap,” or ‘y-axis traction strap” to be more specific, gets its name from characteristics that describe it:

A) The shape it has when used on the patient’s neck. The lower part of the “y” is the part that is wrapped around the patient’s neck and back of the head. After fastening the

⁴ Citations to the examination record are to the USPTO’s Trademark Status and Document Retrieval system (TSDR) by page number in the downloadable .pdf format.

We did not consider the GOOGLE search results attached to the June 4, 2020 Office Action (TSDR 3-5) or the July 16, 2020 Office Action (TSDR 43-49). A list of Internet search results generally has little probative value, because such a list does not show the context in which the term is used on the listed web pages. *See In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (Google® search results provide very little context of the use of ASPIRINA and, therefore, are “of little value in assessing the consumer public perception of the ASPIRINA mark”); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008) (finding truncated Google® search results entitled to little probative weight without additional evidence of how the searched term is used); *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006) (rejecting an applicant’s attempt to show weakness of a term in a mark through citation to a large number of Google® “hits” because the “hits” lacked sufficient context); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1050 (TTAB 2006) (noting that web page links “do little to show the context within which a term is used on the web page that could be accessed by the link”); *In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002) (finding the print-out of Internet search results to be of little probative value due to insufficient text to determine the nature of the information or its relevance); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002) (noting that “[e]vidence of actual use of a phrase by a website has far greater probative value” than a search summary).

In addition, we do not consider the Well Being website (wellbeing365.com.au) because it is an Australian website and the Examining Attorney did not submit any evidence to show that U.S. consumers access this website. June 4, 2020 Office Action (TSDR 9-14).

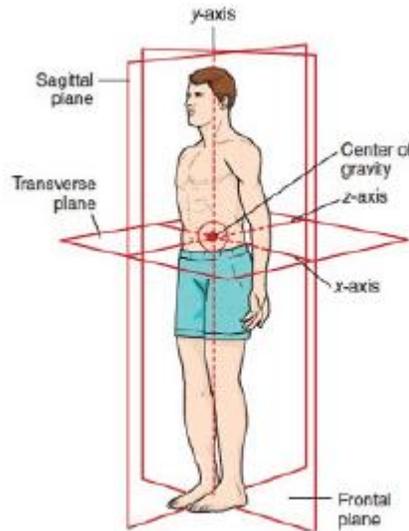
chiropractic Y-Strap to the patient's head, the two "arms" of the "y" lead to the handle bar.

B) The body axis (Y-Axis) where the force takes place. The Y-Axis, also known as vertical axis is aligned with the spine.



HOW DOES THE CHIROPRACTIC Y-STRAP ADJUSTMENT WORK?

The Y-Strap adjustment works by stretching the spine pulling the head in the Y-Axis of the body. This pulling force generates decompression in the vertical discs.⁵



⁵ June 4, 2020 Office Action (TSDR 6). In its website Y-Strap.com, Applicant explains that the Y-STRAP "is inspired by manual spine traction techniques in the Y-Axis to help reduce the tension in the vertebrae along the spine." July 16, Office Action (TSDR 5).

- Kinetic Chiropractic website (kinetic-chiropractic.com)

Y-STRAP CHIROPRACTOR IN OMAHA

The Y-Axis Traction Strap or Y-Strap is a tool used in our office to help with particularly stubborn necks and upper backs. It works by decompressing the spine and correcting compressed joints in the neck and upper back. Certain joints can become very stuck and sometimes require a different technique to get them moving properly. This is why I became a Y-Strap Chiropractor in Omaha. The Y-Strap also works as a form of decompression in our office.

...

This tool has become more known due to its popularity on social networks such as YouTube and Facebook. Dr. Moran is excited to bring this amazing tool that has improved the lives of many people around the world and now as a Y-Strap chiropractor in Omaha.

Give us a call to see if a Y-Strap adjustment at Kinetic Chiropractic in Omaha will work for you.⁶

- Dr. Steven Shoshany's NYC Chiropractic and Spinal Decompression Center

(drshoshany.com)

INDIVIDUALIZED INTEGRATED Y-STRAP TREATMENT IN NYC

Dr. Steven Shoshany's Individualized Integrated Y-Strap Treatment in NYC

The Y-Strap has gained a lot of traction on social media and youtube [sic] since 2017, also known by its original name, the long axis traction treatment seems to be headed back to its inception. Dr. Steven Shoshany recently announced the integration of the lauded and seemingly rediscovered treatment to his Manhattan practice.

⁶ July 4, 2020 Office Action (TSDR 15-16).



The Y-Strap is used to treat a number of neck ailments stemming from neuromuscular and skeletal issues. ... The Y-Strap is a simple device consisting of high strength nylon and soft foam padding. [W]hen affixed to the base of the skull and forehead, the device allows for a secure and snug harness for decompressing the cervical spine.

Unlike most of the popular Y-Strap adjustment procedures, Dr. Shoshany prefers to use the original intention and adhere to the founding intention of the Pettibon system that first developed the long axis traction treatment.⁷

- Clean Spine Chiropractic website (cleanspine.com)

Y STRAP DECOMPRESSION TREATMENT

Dr. Tyler Bigenho is one of the only Chiropractors in California who performs the Y Strap Adjustment. It is not for everyone, so Dr. Bigenho must complete a thorough evaluation beforehand. If we decide it is necessary to use the Y Strap, we will. ...

The Y Strap is a device that fits around the base of the skull/chin that allows for the spine to be stretched. This type of “stretch” is called spinal traction. In other words,

⁷ July 16, 2020 Office Action (TSDR 19-20). In Dr. Shoshany’s January 20, 2020 press release posted on [businessinsider.com](https://www.businessinsider.com), Dr. Shoshany explains that the Y-Strap adjustment traditionally has been called the Y-axis adjustment and it is a Pettibon technique. *Id.* at TSDR 25.

Pettibon appears to be a reference to Pettibon System Chiropractic Equipment & Products. *Id.* at TSDR 55.

the Y Strap allows us to “pull apart” the segments in your spine to release any tension in them.⁸



C. Analysis

The evidence shows that the Y-Strap is a medical device used by chiropractors as an alternative to traction to stretch one’s spine and decompress the vertebrae. The Y-Strap device resembles the letter “Y” and it works on the vertical or Y-axis aligned with the spine. A consumer or prospective consumer for a stretching machine or traction apparatus will immediately know the nature of Applicant’s product (i.e., it is a Y-shaped strap) without the need of thought, imagination or extrapolation. A term or word that merely describes the form or shape of a product falls under the proscription of Section 2(e)(1) of the Trademark Act. *Scanwell Labs., Inc. v. Dep’t of Transp., Fed. Aviation Admin.*, 181 F.2d 1385, 179 USPQ 238, 241 (CCPA 1973) (V-RING is merely descriptive of directional antennas, the primary components of which

⁸ *Id.* at TSDR 50.

were shaped in the form of a “v” and a “ring”); *In re Walker Mfg. Co.*, 359 F.2d 474, 149 USPQ 528 (CCPA 1966) (CHAMBERED PIPE is merely descriptive of an exhaust system consisting of a series of small tuning chambers); *J. Kohnstam, Ltd. v. Louis Marx & Co.*, 280 F.2d 437, 126 USPQ 362 (CCPA 1960) (MATCHBOX SERIES is merely descriptive of toys sold in boxes having the size and appearance of matchboxes); *In re Gagliardi Bros., Inc.*, 218 USPQ 181 (TTAB 1983) (BEEFLAKES is merely descriptive of frozen, thinly sliced beef); *H.U.D.D.L.E.*, 216 USPQ at 358 (TOOBS, the phonetic equivalent of the word “tubes,” is merely descriptive of bathroom and kitchen fixtures in the shape of tubes); *Levi Strauss & Co. v. Plushbottom & Peabody, Ltd.*, 212 USPQ 296 (TTAB 1981) (STRAIGHTS is merely descriptive of straight legged jeans); *In re Ideal Indus., Inc.*, 134 USPQ 416 (TTAB 1962) (WING NUT apt descriptive term for electrical connectors having winged projections for leverage while screwing); *In re Zephyr Am. Corp.*, 124 USPQ 464 (TTAB 1960) (V-FILE is merely descriptive of card filing device in which the opening between the cards was in the form of a “v”). Likewise, the mark Y-STRAP used in connection with the identified goods is merely descriptive of the shape of the goods.

Applicant contends “this analysis is fundamentally flawed as it erroneously takes for granted that ‘Y-Axis Traction Strap’, and as a derivative, ‘Y-Strap’, is a meaningful and significant term of art within the physical therapy space, to justify the conclusion that the Mark is Descriptive of the Goods.”⁹ We did not take anything for granted, nor did we make any assumptions. The above-noted evidence shows

⁹ Applicant’s Brief, p. 5 (4 TTABVUE 6).

chiropractors referring to either Applicant's medical apparatus products or similar apparatus as Y-Straps and that chiropractors use those products to make Y-Strap adjustments.

Applicant asserts, without any evidence, that the above-noted websites refer to Applicant's products "or *seemingly* Applicant's product."¹⁰ "Attorney argument is no substitute for evidence." *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005). *See also Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) ("mere attorney arguments unsubstantiated by record evidence are suspect at best"). It is preferable for an applicant to submit information of this nature by means of sworn testimony. *See In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006-07 (TTAB 2014) (it is critical that Examining Attorneys be provided with detailed information with sufficient evidentiary support). *See also Skyline Corp. v. NLRB*, 613 F.2d 1328, 1337 (5th Cir. 1980) ("Statements by counsel in briefs are not evidence."); *Markowitz Jewelry Co. v. Chapal/Zenray Inc.*, 988 F.Supp. 44, 45 USPQ2d 1530, 1532 (S.D.N.Y. 1997) ("Unsworn statements by counsel simply will not do.").

Even if we consider counsel's unsubstantiated statement, the third parties referring to the Y-Strap and Y-Strap adjustments use those terms descriptively, not as trademarks. *Cf. In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1564 (TTAB 2017) ("The relevant question is how the proposed mark COFFEE FLOUR is used the articles.") There is no indication anywhere in these websites that website owners are

¹⁰ Applicant's Brief, p. 6 (4 TTABVUE 7).

using Y-Strap in a trademark sense to refer to the source of Applicant's medical apparatus. None of the third parties identifies Y-Strap as a trademark of Applicant. None of the evidence of record suggests in any way that the term Y-Strap acts as trademark identifying medical apparatus originating from Applicant.¹¹

Finally, Applicant contends that the above-noted websites

... merely demonstrate the increasing ubiquity of Applicant's product and brand which Applicant has worked hard to build. Applicant's product is well known in the industry and to this end, Applicant has obtained FDA approval on its product, which is listed in the FDA database under its proprietary name, Y-Strap. *See Attached Exhibit A.*¹² Applicant's website has developed the phrase Y-Axis Traction Strap and certain informational articles on errant websites reference Applicant's product in conjunction with Applicant's phrase does not render the term, Y-Axis Traction Strap inherently common and/or descriptive in this domain of inquiry.¹³

The renown of Applicant's product in the industry is not relevant to whether Y-STRAP is merely descriptive. First, the issue before us is whether Applicant's mark is merely descriptive, not whether Applicant's medical apparatus is well known. Second, the renown of Applicant's mark Y-STRAP for medical apparatus is relevant for determining whether that mark has acquired distinctiveness, not whether it is

¹¹ As noted above, Dr. Steven Shoshany in Manhattan explains that the Y-Strap adjustment is a Pettibon technique. However, there is nothing in the record that explains the Pettibon technique or whether it has any connection to Applicant.

¹² As discussed above, we do not consider Exhibit A because Applicant did not timely file it. In any event, the fact that Applicant identified Y-STRAP as the "proprietary name" of its medical apparatus in its FDA application does not ipso facto mean that it is not merely descriptive. Applicant has not provided any evidence that the FDA makes a determination regarding the validity of the purported proprietary name an applicant uses to identify its product in an FDA application.

¹³ Applicant's Brief, p. 6 (4 TTABVUE 7).

merely descriptive. With respect to whether a mark is inherently distinctive or merely descriptive, we analyze where it lies along the generic-descriptive-suggestive-arbitrary-fanciful continuum of words. Word marks that are arbitrary, fanciful, or suggestive are “held to be inherently distinctive” because by their intrinsic nature they identify a particular source. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). *See also In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1684 (Fed. Cir. 2010) (“In general, trademarks are assessed according to a scale formulated by Judge Friendly in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 764 (2d Cir. 1976), which evaluates whether word marks are ‘arbitrary’ or ‘fanciful,’ ‘suggestive,’ ‘descriptive,’ or ‘generic.’”). Even if a mark is not inherently distinctive, it may acquire distinctiveness if “in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.” *Wal-Mart Stores*, 54 USPQ2d at 1068.¹⁴

Finally, the fact that Applicant may have been the first user of the term Y-STRAP does not justify registration if the evidence shows that the term is merely descriptive. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (trademark law does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it

¹⁴ Because Applicant is not seeking to register its mark under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f) (acquired distinctiveness), the renown of the mark Y-STRAP is irrelevant.

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first”) (citation omitted); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016).

Decision: The Section 2(e)(1) refusal to register Applicant’s mark Y-STRAP is affirmed.